COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

ARTHUR E. SHAW
Appellant

41745-6

On Appeal from the Superior Court of Grays Harbor County

10-1-00271-8

The Honorable Gordon Godfrey

AMENDED REPLY BRIEF

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant Arthur E. Shaw

McCabe Law Office
P.O. Box 46668, Seattle, WA 98146
206-453-5604 ▪ mccabejordanb@gmail.com

CONTENTS

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

AUTHORITIES CITED

Washington Cases

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Federal Cases

Washington Statutes

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Court Rules

Constitutional Provisions

Treatises

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

II. STATEMENT OF THE CASE

Appellant Arthur E. Shaw's house in Ocean Shores burned down on the morning of its scheduled foreclosure sale. RP 47. Mr. Shaw had vacated the house several months earlier, but frequently visited the neighborhood as an occasional guest of his ex-wife. RP 125, 282, 294. He was not in the habit of locking the door of his house. RP 293, 306. Strangers had occasionally entered the vacant house. RP 52, 337.

The night before the fire, Shaw visited the home of his ex-wife and her current companion, then made a few trips to his house to remove some belongings. RP 281, 287-88. Just after daybreak, his truck's engine failed. RP 325. This truck frequently broke down. RP 283, 289. Shaw coasted the truck to a stop on a vacant lot a few hundred yards from the house, then went to the rear of the lot where he lay down to rest. RP 328.

Shaw awoke to find his truck marked off with crime-scene tape. Curious, but cautious, he climbed a tree and peered over a fence. He saw that his house had burned to the ground. RP 329.

Ocean Shores Police Officer Jeff Elmore arrived at the blazing home sometime before 7:00 that morning. RP 19, 90. Firefighters immediately realized the house could not be saved. They never

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

considered going in, but focused their efforts on saving the house next door. RP115-17.

At around 11:30, Officer Elmore spotted Mr. Shaw in the tree. RP 94. He and a K-9 officer approached Shaw with guns drawn. RP 330. Elmore ordered Shaw to get down from the tree. RP 25. The trial court ruled that Shaw was seized at that point. RP 35. Elmore arrested Shaw for trespassing. RP 27.

Elmore testified that Shaw appeared "singed," and smelled of "accelerant" and smoke. RP 113, 238. Shaw was in the yard maintenance business, and frequently transported gasoline in containers to service his lawn mower and weed whacker. RP 54, 283, 292. He also had a sideline collecting and burning residential trash. RP 284, 291, 294, 335. In the course of this work, he frequently singed himself and spilled gasoline on his boots. RP 336-37, 351. His clothes usually were dirty, and he often smelled like gasoline. RP 285. At the time of his arrest, he had been wearing the same clothes for three days. RP 328.

At trial, testifying about Shaw's singed hair and eyebrows, Officer Dan Wertanen defined the word "singed" as: "[It's] like if you light a barbecue and it explodes in your face with the vapors." RP 68.

After Shaw was in custody, the police obtained a warrant to search Shaw's truck. RP 238. Officer Russell Fitts searched it. He found a

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

couple of empty plastic gas containers. In the glove compartment were a striker, one lighter, and the vehicle registration. Warrant, Supp. CP ___ at 3; RP 239-40. Fitts put the items from the glove box in a plastic bag. RP 239; CP 27 (Ex. 41.) Officer Elmore turned over to Fitts two more lighters and a receipt which he had recovered from Shaw's personal effects at the jail. Warrant, Supp CP ___ at 4. Fitts sealed these in the same bag with the items recovered from the truck. RP 240, 257. (Only one lighter was recovered from the truck, but several lighters ended up in Ex. 41.) At trial, Elmore testified that all the items came from the truck. RP 257.

Over the next several days, ATF agents entered the property to investigate the cause of the fire. RP 140, 158. One thought an oil lamp had caused the fire. RP 190. This witness opined that the particulars of the damage was typical of a relatively heavy hydrocarbon gas explosion (i.e., not natural gas), but he conceded that the poor construction of the house also could have resulted in the same type of explosion regardless of whether or not an accelerant was used. RP 195, 198.

Mr. Shaw's ex-girlfriend testified that Shaw once fantasized about blowing up the house for the insurance money. RP 307. It was undisputed, however, that the insurance had long since lapsed and the house was not insured at the time of the fire. RP 271, 337, 376.

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Shaw was convicted by jury on one count of first degree arson. His only criminal history was a single drug offense in 2010. CP 38. The court sentenced him to the top of the standard range, 41 months. CP 39.

III. ARGUMENTS IN REPLY

Reason for Amended Reply Brief: This Court first granted the State's motion to supplement the record on appeal with a search warrant that was never introduced in the superior court, then granted the State's motion to strike Appellant's reply brief which was Shaw's first opportunity to address the warrant's constitutional defects. Shaw assigns error to this denial of due process and incorporates the arguments in his answer to the State's motion to strike and the motion to modify the Clerk's ruling. This amended brief omits the challenges to the validity of the search warrant.

1. THE POLICE SEIZED SHAW WITHOUT PROBABLE CAUSE.

The Fourth Amendment to the United States Constitution and art. 1, § 7 of the Washington State Constitution prohibit unreasonable searches and seizures. *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001); *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979). The probable cause analysis is essentially the

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

same under Const. art.1, § 7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008).

Probable cause to arrest does not exist unless the arresting officer has reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a reasonably cautious and prudent officer in a belief that an offense has been committed. *State v. Scott*, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). In Washington, there is no "good faith" exception to the exclusionary rule based on an unlawful seizure. *State v. White*, 97 Wn.2d 92, 107, 640 P.2d 1061 (1982). The remedy is to exclude all evidence that was obtained incident to the unlawful arrest. *White*, 97 Wn.2d 92 at112.

First, the State claims that probable cause can never be challenged for the first time on appeal because sometimes it is based on inadmissible evidence. BR 5. The State cites to no authority for this, and this Court does not consider argument without citation to authority. *State v. Pruitt*, 145 Wn. App. 784, 800, 187 P.3d 326 (2008).

Then the State claims that Shaw cannot challenge his warrantless arrest for the first time on appeal. BR 5. This is wrong. The Rules of Appellate Procedure permit a manifest constitutional error to be raised for the first time on appeal, and the Court may choose to consider a manifest error affecting a constitutional right. RAP 2.5(a)(3). A warrantless seizure

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

is such an issue. The Court may choose to review it, provided the record is sufficient to permit meaningful review. *See, e.g, State v. Donohoe*, 39 Wn. App. 778, 782, 695 P.2d 150 (1985). Here, the record developed at the CrR 3.5 hearing and the trial is sufficient to permit review of Shaw's claim that the police had no grounds to seize him without a warrant.

"An arrest not supported by probable cause is not made lawful by an officer's subjective belief that an offense has been committed. By the same token, an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists." *State v. Huff*, 64 Wn. App. 641, 645-46, 826 P.2d 698 (1992) (internal cites omitted.) In citing *Huff*, the State omits the first sentence of this holding, i.e. that an officer's subjective belief is not a substitute for probable cause. BR 6.

Mr. Shaw was purportedly arrested for trespassing. But the police did not have probable cause to arrest him either for trespassing or for arson. Now the State appears to concede there was no probable cause to arrest for trespassing, but claims probable cause cannot be ruled out to arrest him for arson because the record is "unclear" as to when the police acquired probable cause to seize Shaw for arson. BR 5-6. This is wrong; the record is not unclear.

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

The record is unequivocally clear that Shaw was arrested before the search of his vehicle, before the search of his personal effects at the jail, and before ATF agents searched the burned house for evidence that arson had actually been committed. CP 8; RP 140, 158, 219, 238.

Arresting officer Elmore's subjective belief did not make the warrantless seizure lawful. *Huff*, 64 Wn. App. at 645. While *Huff* recognizes that the law does not expect a patrolman "always be able to immediately state with particularity the exact grounds on which he is exercising his authority," *Id.* at 646, the law does expect a patrolman to be able to articulate grounds amounting to more than a hunch. Probable cause for a warrantless arrest requires facts and circumstances within the arresting officer's knowledge that are sufficient to cause a person of reasonable caution to believe that "a person has committed or is committing a felony." RCW 10.31.100.[1]

Shaw was subjected to a warrantless arrest on Officer Elmore's subjective belief, i.e. mere hunch. The remedy is to suppress all evidence that was not obtained independently of his arrest. This would include the evidence from the house and his vehicle, since the arrest preceded the issuance of any search warrant.

---

[1] This frequently is inaccurately rendered in judicial decisions in the passive voice as a belief that "an offense has been committed." *See, e.g., Huff* at 645-46; *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The arrestee must be believed to have committed an offense.

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

2. THE TRESPASSING STATUTE DOES NOT PROVIDE GROUNDS TO SEIZE SHAW.

When the police observe a person engaged in unlawful behavior, probable cause exists to stop the individual. *State v. Larson*, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). But when an officer stops an individual, not to enforce the law cited as grounds for the stop, but to conduct an unrelated criminal investigation, the stop is pretextual. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Pretextual stops violate art. 1, § 7 because they constitute seizures without "authority of law."

When a stop is challenged as pretextual, the reviewing Court considers the totality of the circumstances, including the officer's subjective intent as well as the objective reasonableness of the officer's conduct. *Ladson*, 138 Wn.2d at 358-59.

Lacking probable cause to detain Shaw as an arson suspect, Elmore arrested him for trespassing. RP 27. To justify seizing Shaw for the purpose of an unrelated investigation, Elmore applied the trespassing statute in a manner that rendered the statute susceptible to arbitrary enforcement and in a way that would prevent an ordinary citizen from knowing when his conduct was unlawful. The State does not respond to Shaw's vagueness challenge or his claim that this ground for seizing him was pretextual. Rather, the State now claims Elmore had probable cause

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

to arrest Shaw for an arson for which no evidence was acquired until several days later. BR 5.

Elmore had no basis to seize Shaw for trespassing and lacked probable cause to arrest him for any crime. Elmore purported to seize Shaw for trespassing solely for the purpose of an unrelated investigation. Therefore, all evidence derived from the unconstitutional seizure should have been suppressed, and a conviction resting on such evidence cannot stand. The Court should reverse the conviction and dismiss the prosecution.

3. PHOTOGRAPHS OBTAINED DURING SHAW'S UNLAWFUL SEIZURE WERE INADMISSIBLE.

Evidence that is "fruit of the poisonous tree" must be suppressed if it was obtained as the result of unlawful police conduct that violated Const. art. 1, § 7 or the Fourth Amendment. The State does not dispute Shaw's challenge to the admission of photographs of his person as poisoned fruit of his unlawful seizure. As discussed above, the officers had no grounds to impede Mr. Shaw's freedom of movement. Absent some articulable indication that Shaw was not welcome in his neighbor's yard, Elmore had no grounds to arrest him for trespassing. Therefore, the photographs taken of Shaw at the point of arrest were fruit of the poisonous tree and should have been suppressed.

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

This error was not harmless, because the State offered the photographs to prove Mr. Shaw's guilt by showing that his hands, face, hair and clothing were singed. The remedy is to reverse Shaw's convictions.

4. TWO POLICE WITNESSES TESTIFIED TO IMPERMISSIBLE OPINIONS OF GUILT.

A defendant has a constitutional right to an unbiased jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). As quasi-judicial officers representing the people, prosecutors have a duty to act impartially in the interest only of justice. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). A prosecutor must ensure that an accused receives a fair trial and avoid the risk of a verdict tainted by prejudice rather than based on reason. *State v. Belgarde*, 110 Wn.2d 504, 516, 755 P.2d 174 (1988).

Opinion testimony is testimony based on a belief or idea rather than direct knowledge of the facts. *Demery*, 144 Wn.2d at 760, quoting Black's Law Dictionary 1486 (7th ed. 1999). Testimony that conveys an opinion on guilt violates a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3); *Demery*, 144 Wn.2d at 759.

Officer Elmore testified that Shaw smelled of "accelerant." RP 113. This was an opinion. Gasoline is properly referred to as an

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

accelerant only in the context of a fire. Then, Officer Wertanen testified that he understood the word "singe" to mean, "like if you light a barbecue and it explodes in your face with the vapors." RP 68. But the word "singed" simply means "scorched." It is not usually defined in terms of explosions or vapors.

The State concedes that the term "accelerant" is a term of art in the law enforcement community for a substance that starts a fire, not one that starts a lawn mower, and that Elmore should have said he smelled some sort of hydrocarbon. BR 9. The State does not attempt to justify Wertanen's manifestly prejudicial definition of "singed", which could likewise have been given without a gratuitous reference to an exploding barbeque — with its connotation of squirting accelerant on combustible material and throwing a match on it.

Under the *Heatley* test, this testimony impermissibly conveyed to the jury the officers' opinions of guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Juries are particularly influenced by opinions of guilt from police officers. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003), citing *Demery*, 144 Wn.2d at 759. This evidence was flagrantly ill-intentioned and prejudicial. Any defense objection would have served

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

merely to exacerbate the harm by impressing the image of accelerants and exploding vapors on the minds of the jury.

Reversal is required.

5. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION.

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Nevertheless, the State must prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The State must produce enough evidence to permit the jury to find a factual basis for each element. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Neither the jury nor the reviewing court can rely on guesswork, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Here, it is not disputed that Shaw's house was destroyed by fire. Depending on how this Court resolves the suppression issues, sufficient evidence may be salvaged from which a jury could conclude the fire was deliberately set. But the State did not produce any substantial evidence that Shaw was the arsonist. An abundance of evidence proving one element of an offense cannot compensate for the absence of evidence on another element.

First, the State dismisses the lack of evidence establishing the time of the fire. BR 12. But this is highly relevant to the essential element of manifest danger to life. RCW 9A.48.020(1)(a). The State claimed that the next-door neighbor was mere moments away from stepping into the adjoining driveway with his children when the fire started. But he did not witness the start of the fire until 7:25 a.m.. RP 47. Officer Elmore refuted this by testifying that he arrived at the scene of the reported fire before 7:00 a.m. RP 19, 90. Allowing time for dispatch to receive the report and Elmore to get there, the fire could not have started later than 6:45 a.m. This in turn is refuted by the passing motorist, Griffith, alleged by the State to have seen the fleeing arsonist climbing a fence some distance away between 7:15 and 7:20 a.m. RP 62, 65.

The State also does not address the testimony of the firefighters regarding its alternative manifest danger to life theory. RP 363. The

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

firefighters testified there was no possibility they would even have considered attempting to enter the building or even get close to it, because the fire was too already too fierce when they arrived. The firefighters instantly perceived that the structure was not savable and it began to collapse within minutes of their arrival. RP 114-17. Accordingly, since there was no question of trying to enter, they were never in danger from doing so. RP 119-20.

The timeline described by the State's witnesses simply does not make sense, and it is unlikely that twelve reasonable jurors could be persuaded that the perpetrator (whose only plausible defense could have been an iron-clad alibi) would take a four-hour nap in the immediate vicinity, as Elmore testified. RP 20, 28, 100. The prosecutor invited the jury to speculate that Shaw fled the scene earlier but came back. But the only evidence for this was Griffith's equivocal identification of a person whose head was covered by a hat and a hooded sweatshirt. Moreover, Griffith's identification was tainted by showing him a photomontage that the court ruled was too unreliable to be shown to the jury. RP 78, 81, 83.

One motive the State floated was insurance proceeds. RP 307. But the evidence was overwhelming that there was no insurance, which Shaw must have known. RP 270-71, 337.

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

The record contains no evidence that Shaw's truck was "seemly hidden" [sic] as the State twice asserts in its responding brief. BR 7, 12. It was simply parked in plain sight. And the State did not refute that Shaw kept gas containers in his truck because of the nature of his work, or that his clothes and boots usually smelled of gasoline, or that his skin and hair frequently were singed due to legitimate exposure to smoke and fire.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Hickman*, 135 Wn.2d at 103; *Hardesty*, 129 Wn.2d at 309. The Court should reverse the convictions and dismiss with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse Mr. Shaw's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this January 19, 2012.

Jordan B McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for Arthur Earl Shaw

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

CERTIFICATE OF SERVICE

Jordan McCabe certifies that this Reply Brief was electronically served on opposing counsel vial the Division II upload portal:

knewman@co.grays-harbor.wa.us
Kraig Christian Newman
Grays Harbor County Prosecutor's Office

A paper copy was mailed this day, first class postage prepaid, to:

Arthur E. Shaw, DOC # 339592
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Jordan B McCabe Date: January 19, 2012

Jordan B. McCabe, WSBA No. 27211
Seattle, Washington

McCabe Law Office
PO Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

MCCABE LAW OFFICE

January 19, 2012 - 1:42 PM

Transmittal Letter

Document Uploaded: 417456-Other Brief.pdf

Case Name: State v. Shaw

Court of Appeals Case Number: 41745-6

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Other
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Sender Name: Jordan B Mccabe - Email: **mccabejordanb@gmail.com**

A copy of this document has been emailed to the following addresses:

knewman@co.grays-harbor.wa.us